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In the Supreme Court of the United States

OCTOBER TERM 1943.

Nos. 789, 790 and 791.

E. G. BLUE, *et al.*,
WM. N. CLARK, *et al.*,
EARL PARDEE, *et al.*,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING.

MATTHEW L. BIGGER,
50 East Broad St., Columbus, Ohio,

FRANK WIEDEMANN,
Marion, Ohio,
Counsel for Petitioners.

CARRINGTON T. MARSHALL,
Co-Counsel for Willard S. Holcombe.

STRELITZ, DOWLER & WIEDEMANN,
Marion, Ohio,
Of Counsel.

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PETITION FOR REHEARING.

To The Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

Your Petitioners, E. G. Blue, William N. Clark, Willard S. Holcombe, Dan S. Riggle, Byron L. McClure, Carl A. Bemman, George F. Buck, Earl Pardee, George E. Reinwald, W. Hal Marshall, A. L. Malott, Earl L. Holliday, S. F. Neidigh, R. C. Deck and Hiram Berry, respectfully submit that they have been aggrieved by the denial of their Petition for Writs of Certiorari by your Honors on May 1, 1944 in the respects hereinafter set forth and pray for a rehearing of said matter.

Very briefly we shall point out how the Court below departed from the principles of fundamental law in allowing this unjust conviction of these Petitioners to stand. We feel it our duty to bring to the attention of your Honors these matters so that there may be no possibility of your Honors having overlooked what we believe to have been a

gross departure from the established safeguards of our criminal jurisprudence.

1. The Federal mail fraud statute when applied to two or more persons is in essence a conspiracy statute. To constitute an offense there must be some common design among the participants in the violation. Those who enter into the common plan must know what they are doing to be guilty of joining in the unlawful scheme. Circumstances when relied upon to show knowledge and to convict must certainly be stronger than the physical facts that exist. Because one is identified with a group of persons in promoting an enterprise is not a circumstance in and of itself that will tie him to a fraudulent scheme. Certainly some evidence must point to the plain fact that he knew of and joined in the plan before his conviction can legally be sustained. The "presumption of innocence always attends him, and lies at the foundation of our criminal law."

How can we determine whether one who is identified with an enterprise that is alleged to be fraudulent has determined upon a course of criminal conduct? Circumstances is, of course, the answer, but if it is our province to determine who of a group have engaged in a criminal course of conduct, we are bound by the rules of law not to look *over* the circumstances that are positive and plain at those which are problematical. Such a "verdict is mere guesswork. *Manning vs. M. L. Ins. Co.*, 100 U. S. 693, 699."

Suppose that two men are seen sitting in a car outside a bank. One man walks into the bank with a gun in his hand. The other remains in the car. A holdup occurs in the bank. Later the man who sat in the car is convicted as an accessory but the man who went into the bank, gun in hand, is not even indicted. Would not the *circumstance* that the man who went into the bank, gun in hand, was not indicted be of such weight as to absolutely destroy the circumstance tending to prove the guilt of the man who re-

mained in the car? Could a Court legally on circumstantial evidence permit the conviction of the man who sat in the car to stand? Does not "the presumption of innocence attend" and protect him? Would not the circumstance that the man who went into the bank, gun in hand, was not indicted be of such overwhelming weight on the question of knowledge on the part of the man in the car that it would be a Court's duty to direct a verdict of not guilty? The trustees of Forest Glen, Inc., were the trustees also of the Parks. They managed and controlled everything. They knew everything. They planned and executed everything. Yet they were exonerated by the Government.

This homely illustration explains the simple point of law upon which we rely. It is so simple and so plain that that may be the reason why it has been overlooked by a Circuit Court and by your Honors. In this connection it must not be overlooked that what the salesmen did in making these sales and executing these documents was charged by the Court and admitted by the Government not to be illegal or fraudulent in themselves.

How can the circumstances in this case be sufficient to sustain the conviction of these salesmen Petitioners when fraudulent knowledge upon their part is one of the essential elements to be proved and when the very men who controlled the parks for 4½ years were not indicted?

The fact that they were not indicted glares up at us from the record. It is undisputed. It destroys the Government's case against these Petitioners. The Trial Court and the Circuit Court failed to notice the effect of this simple fact and we believe that your Honors overlooked its effect in passing on the Petition for Writs of Certiorari.

2. It is undisputed that the three parks are in operation, belong to the lot owners and investors in lots and that they are very valuable; that the record and existing

conditions and physical facts establish the fact and probability that the contracts with the investors were being and will be carried out substantially notwithstanding all this litigation and discouragement. All this can be established on a hearing in this Court. Even the Government witness admitted the records showed "they intended to continue to operate," and necessarily carry out their contracts and not fold up. This conclusion must result under the presumption of innocence. The investors *were* given something for their money. In the usual mail fraud case the investor is given nothing of value. He is deliberately cheated. There is no attempt made in the instant case to justify conviction on such a ground. However, the authorities relied on by the Solicitor General and the Court of Appeals and reasoning of the Circuit Court of Appeals was based upon the cases which disclose only a "Ponzi Scheme." In the instant case the criminality charged is that these Petitioners promised the investors that they would be paid certain sums and that since such amounts were not *all* paid, by May 16, 1938, although not due for 1 to 5 years thereafter as shown by the record, that this justifies a jury in *inferring* that they would never be paid. Such an inference is not based on fact because the parks are there to look at. They contain 33,000 sections to be sold. They are owned by the investors and lot owners. This simple fact seems not to have been considered and we earnestly and respectfully call it to the attention of your Honors.

There is a real conflict between the decision of the Circuit Court of Appeals in this case and the decisions of the Supreme Court and the Circuit Courts of Appeals on the same question.

3. The indictment against petitioner salesmen must be proved as alleged. It cannot be assumed that the trial proceeded on a different theory. Acts done to effect the object

of the alleged conspiracy cannot be used to prove the conspiracy as against the Petitioners.

The indictment (pp. 1-12 R.) alleged directly that the Petitioner salesmen formed a scheme to defraud on or about July 1st, 1933 and formed a conspiracy on or about July 1st, 1933 to carry that scheme into effect by using the mails. The Government did not prove either charge and did not attempt to prove either charge. They do not contend that they proved either charge as against Petitioner salesmen. The convictions cannot be sustained by showing the Government proved something else, which is what they are really contending.

The indictment in this case recited that these petitioner salesmen (pp. 1-12 R.)

> "*unlawfully had devised and intended to devise, a scheme* and artifice *to defraud* and *for obtaining money* and property *by means of false representations.*"

This was not an indictment for merely obtaining money by false representations, *but of using the mails to carry out a scheme* and a conspiracy against the petitioners' government to use the mails to carry out a scheme. This Court has said these must not be confounded.

The Solicitor General stated,

> "*No particular fact may be regarded as conclusively establishing the guilt of any of the individual petitioners, the composite picture amply supports the conclusions of the jury* * * *."

It is conceded that there is no direct proof of the allegations contained in the indictment, that the Petitioner salesmen entered a scheme to defraud and used the mails therefor, or that they entered a conspiracy, as alleged in the indictment.

Yet the Solicitor General contends in effect that the circumstances are sufficient to sustain the conviction of Petitioners and the affirmance by the Circuit Court of

Appeals. The record shows the charge as alleged against the Petitioners was not proved or established, under the presumption of innocence. The Government proved a different situation. They alleged something illegal as against Petitioners. They proved what is admittedly legal. If the indictment cannot be sustained, when the acts alleged are legal (108 U. S. 199), how then can a conviction stand when all that the Government proved was admittedly legal? Contrary to the decisions of this Court the Government relied upon intendment and implication, in the indictment.

We believe this Court has overlooked that what the Government, the Solicitor General and the Circuit Court of Appeals contend as being sufficient to sustain this conviction, cannot on principle and on the undisputed record, be supported or sustained, but is in direct conflict with the decision of the United States Supreme Court in the cases of *U. S. vs. Britton et al.*, 108 U. S. 199-207, p. 205; *Joplin, etc. vs. U. S.*, 236 U. S. 531-549, pp. 535-536; *Pettibone vs. U. S.*, 148 U. S. 197, 202, 210.

4. History is full of instances where prophecies were made of failure of projects which afterwards succeeded. The circumstantial evidence in this case rests very heavily upon the prophecy that the whole park building project would fail. As a matter of fact there never was any place for prophecy in this controversy. This project was proceeding satisfactorily until self seeking attorneys halted everything by receiverships and criminal prosecutions. We repeat what was stated in the closing paragraphs of the separate brief of Holcombe that even in spite of those obstacles, the project will yet fulfill the objects of the founders. The record of this prosecution and the actual, existing facts sustain this claim. We submit that a judgment of conviction such as the one in the instant case should not be permitted to stand when prophecy of what

may happen takes the place of essential, believable, actual facts.

5. One of the most dangerous weapons in the hand of a misguided Prosecutor is control by him of the time taken to present the Government's case. Dragging a case for months might be used to break down all resistance on the part of a defendant. The words "speedy trial" in our Constitution have a plain enough meaning. In a simple mail fraud case such as the instant case, it does not seem possible that the Circuit Court could have considered what was done by the Prosecutor and the Jury in the trial of this case without being aware of the violation of the defendants' rights in regard thereto. In the belief that your Honors may not have considered what is shown by the record even in the instances which we have pointed out in our Brief in support of our Petition for Writs of Certiorari, pages 29, *et seq.*, we respectfully call them to your attention.

6. Your Honors may have overlooked the fact that in a trial lasting 6½ months where certain facts which were not in and of themselves criminal acts, because of constant repetition, might have taken on the semblance of criminal acts in the eyes of the jury. This situation is illustrated by reference to 16 *C. J.*, p. 650, Sec. 1288; 22 *C. J.*, p. 1294, Sec. 757; 124 Iowa 414, 105 N. W. 375.

7. We believe that the *reasons* for the length of this trial of a simple conspiracy case as shown by the record in this case are so important that we would feel derelict in our duty if we would not again call this to the attention of your Honors so that there can be no possibility of them not being considered.

8. What is wrong with our criminal jurisprudence; or, where has the Petitioners' counsel failed, when it becomes

possible for a man such as Willard S. Holcombe to be convicted under such a charge and under the presumption of innocence, and sent to prison, when the record shows that the principals, trustees and managers—the planners and those who executed the plans, outside of Marshall and Jacoby—who were convicted, Jacoby having his sentence suspended, were not indicted but exonerated; when the record shows that all Holcombe did was legal under the charge of the Court and the admission of the District Attorney at the trial, when not a single witness investor testified against him, when there is admittedly no proof whatever that he made any false representations to any investor, pursuant to any scheme to defraud or otherwise; when the forms used in making the sales were approved by the state; when the contracts he did make were being carried out?

We do not know what the situation with reference to the case of *Gerhard et al.* is, just admitted for a hearing, but we note it is a conspiracy case. Those men were apparently trying to undermine the Government in war time. These men were all, in some manner working in behalf of the Government. It may be possible that the reasoning followed and principles applied there will justify a rehearing in this case.

WHEREFORE, and for other reasons appearing in Petitioners' Brief, Petitioners respectfully urge that a rehearing herein may be granted and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

E. G. BLUE,
WILLIAM N. CLARK,
WILLARD S. HOLCOMBE,
DAN S. RIGGLE,
BYRON L. MCCLURE,
CARL A. BEMMAN,
GEORGE F. BUCK,
EARL PARDEE,
GEORGE E. REINWALD,
W. HAL MARSHALL,
A. L. MALOTT,
EARL L. HOLLIDAY,
S. F. NEIDIGH,
R. C. DECK,
HIRAM BERRY,
Petitioners,

By MATTHEW L. BIGGER,
FRANK WIEDEMANN,
Counsel for Petitioners.

CARRINGTON T. MARSHALL,
Co-Counsel for Willard S. Holcombe.

STRELITZ, DOWLER & WIEDEMANN,
Marion, Ohio,
Of Counsel.

We, Matthew L. Bigger, Frank Wiedemann and Carrington T. Marshall, Attorneys, legally admitted to practice in the United States Supreme Court, do certify that in our opinion the foregoing Petition for Rehearing in the cases of E. G. Blue, *et al.*, Wm. N. Clark, *et al.*, Earl Pardee, *et al.*, Nos. 789, 790 and 791, is well founded and is not presented for the purpose of creating a delay.

May ...., 1944.

MATTHEW L. BIGGER,
FRANK WIEDEMANN,
CARRINGTON T. MARSHALL.